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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ERIC NORMAN OLSEN,) Case No. EDCV 18-1550 JFW(JC)
12 Petitioner,)
13 v.) ORDER DISMISSING PETITION
14 DANIEL STONE,) FOR WRIT OF HABEAS CORPUS
15 Respondent.) AND ACTION
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17 On July 10, 2018, the Clerk received petitioner Eric Norman Olsen's *pro se*
18 "Petition for a Writ of Habeas Corpus by a Person in State Custody" with
19 attachments (collectively, the "Petition"), and accompanying exhibits including the
20 Clerk's Transcript ("CT"), which were formally filed on July 20, 2018.¹ Petitioner
21 – who is not confined – challenges a 2007 conviction in San Bernardino County
22 Superior Court Case No. FWV038654 ("State Case"). (Petition at 2). The Petition
23 reflects that in the State Case: (1) petitioner pleaded nolo contendere to six counts
24 of lewd acts on a child for which he was sentenced on July 6, 2007 to five years in
25 state prison; (2) petitioner was paroled under the supervision of the Riverside Parole
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27 ¹As the pages of the Petition are not sequentially numbered, the Court refers to pages as
28 they are numbered on the docket in the Court's Case Management/Electronic Case Filing
(CM/ECF) System.

1 Unit in Riverside County on November 11, 2010; and (3) petitioner was discharged
2 from parole on November 11, 2015. (Petition at 2, 9, 26-27; CT 191-206).

3 On August 1, 2018, this Court issued an Order to Show Cause Why This
4 Action Should Not Be Dismissed for Lack of Subject Matter Jurisdiction (“OSC”),
5 because it appeared that petitioner was not “in custody” when he filed the instant
6 Petition. (Docket No. 6). As the Court advised: (1) federal courts have subject
7 matter jurisdiction to consider habeas petitions by individuals challenging state
8 court criminal judgments only if the petitioner is “in custody in violation of the
9 Constitution or laws or treaties of the United States” (28 U.S.C. §§ 2241(c)(3),
10 2254(a); Brock v. Weston, 31 F.3d 887, 889 (9th Cir. 1994)); (2) once a petitioner’s
11 sentence has fully expired, he is precluded from challenging that conviction because
12 he is no longer “in custody” for purposes of federal habeas review (Maleng v.
13 Cook, 490 U.S. 488, 492 (1989) (per curiam)); and (3) certain recognized
14 exceptions to the “in custody” jurisdictional requirement appeared not to apply in
15 this case. (OSC at 2-3).

16 On August 13, 2018, petitioner filed a response to the OSC (“Response”),
17 stating that he was “in custody” when he filed a habeas petition in 2015 (the “2015
18 Petition”) in Olsen v. Stone, EDCV 15-2014-JFW(JC) (the “Prior Action”), which
19 attempted to challenge the same conviction. (Response at 2). The Court summarily
20 dismissed the 2015 Petition without prejudice because it was wholly unexhausted.
21 (Docket Nos. 4-5 in the Prior Action (order and judgment dismissing the 2015
22 Petition, filed on October 13, 2015)). Petitioner previously attempted to file the
23 instant Petition as an “amended” petition in the Prior Action, but since there was no
24 basis in the record to vacate the judgment which had been entered in the Prior
25 Action over two and one half years earlier, the Court ordered the Clerk to open a
26 new action and to file the proposed amended petition as an original Petition in this
27 action. (Docket No. 7 in the Prior Action (order)). Petitioner argues that the
28 Petition in this action is not “successive,” and should be treated with the 2015

1 Petition as one application for relief to confer jurisdiction. (Response at 1-2 (citing
2 Stewart v. Martinez-Villareal, 523 U.S. 637, 643-45 (1998) (second habeas petition
3 is not “successive” if claim raised in first habeas petition was dismissed as
4 premature), and Carafas v. LaVallee, 391 U.S. 234, 238 (1968) (petitioner must be
5 “in custody” at the time a habeas petition is filed)).

6 The Ninth Circuit has considered and rejected the argument petitioner now
7 makes. See Henry v. Lungren, 164 F.3d 1240, 1241 (9th Cir.), cert. denied, 528
8 U.S. 963 (1999). Henry had filed his first habeas petition in federal court in 1990,
9 which was dismissed without prejudice in 1995 for failure to exhaust. Henry
10 thereafter exhausted his claims in state court and filed another federal habeas
11 petition in 1997 – after his release from prison and discharge from parole – arguing
12 that the date he filed his original petition should determine whether he satisfied
13 Section 2241's “in custody” requirement. Id. at 1241. The Ninth Circuit disagreed,
14 finding that the district court’s dismissal of the original petition for failure to
15 exhaust state remedies “terminated the litigation” and, accordingly, the subsequent
16 petition would not “relate back” to the date the original petition was filed. Id.
17 (citations omitted; distinguishing Miller v. Laird, 464 F.2d 533 (9th Cir. 1972)
18 (holding that an amended petition relates back to the date of the original petition
19 where the original petition had not been dismissed and the action was still
20 pending)); see generally Rasberry v. Garcia, 448 F.3d 1150, 1155 (9th Cir. 2006)
21 (habeas petition does not relate back to the date of filing of prior federal habeas
22 proceeding which was dismissed without prejudice); Dils v. Small, 260 F.3d 984,
23 985 (9th Cir. 2001) (“Dils argues that his third petition relates back to his first
24 petition. Our decisional law forecloses that contention if the first petition was no
25 longer pending.”) (citations omitted); compare Keating v. Hood, 191 F.3d 1053,
26 1060 (9th Cir. 1999) (new habeas petition filed before first petition was dismissed
27 was properly treated as amendment or resubmittal of first petition, notwithstanding
28 state’s contention that petitioner was not “in custody” at the time he filed a new

1 petition), cert. denied, 531 U.S. 824 (2000), overruled in part on another ground by,
2 Payton v. Woodford, 346 F.3d 1204, 1217 n.18 (9th Cir. 2003) (en banc); Evers v.
3 Napolitano, 2010 WL 5115410, at *2 (N.D. Cal. Dec. 9, 2010) (petitioner was “in
4 custody” under Section 2241 where amended petition filed after release from
5 custody related back to pending habeas petition that was filed when he was in
6 custody; original petition had been dismissed with leave to amend and thus was still
7 “pending for further proceedings either by amendment . . . or entry of final
8 judgment” when the amended petition was filed) (citations omitted).

9 The Ninth Circuit sometimes has permitted “relation back” in a habeas action
10 where there was something “improper” about the District Court’s dismissal of a
11 prior proceeding. See, e.g., Anthony v. Cambra, 236 F.3d 568, 573-74 (9th Cir.
12 2000) (outright dismissal of “mixed” petition was improper), cert. denied, 533 U.S.
13 941 (2001); Calderon v. United States District Court, 163 F.3d 530, 540 (9th Cir.
14 1998) (en banc) (noting that district court could exercise nunc pro tunc power to
15 deem recently filed habeas petitions to have been filed as of filing date of two
16 earlier petitions that were erroneously dismissed), cert. denied, 526 U.S. 1060
17 (1999), abrogated on other grounds, Woodford v. Garceau, 538 U.S. 202 (2003).
18 However, there was nothing improper about this Court’s dismissal of the Prior
19 Action.

20 Petitioner has neither argued nor shown that he was “in custody” at the time
21 he filed the instant Petition, or that he meets one of the recognized exceptions to the
22 “in custody” requirement for federal habeas review. Because it plainly appears
23 from the face of the Petition and its exhibits that this Court lacks jurisdiction to
24 grant habeas relief to petitioner, this action is hereby dismissed for lack of subject
25 matter jurisdiction. See Rule 4 of the Rules Governing Section 2254 Cases in the
26 United States District Courts (requiring dismissal where it plainly appears from the

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1 face of a petition and its exhibits that petitioner is not entitled to federal habeas
2 relief as requested).

3 IT IS SO ORDERED.

4 IT IS FURTHER ORDERED that Judgment be entered accordingly and that
5 the Clerk serve a copy of this Order and the Judgment on petitioner and on any
6 counsel for respondent.

7 DATED: September 6, 2018

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11 HONORABLE JOHN F. WALTER
12 UNITED STATES DISTRICT JUDGE
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